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SUPREME COURT, U. S.
No. 71-611

In the Supreme Court of the United States

OCTOBER TERM, 1971

SAMUEL RIZZO DECAVALCANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1971. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 9, 1971, and on November 1, 1971, the petition was filed. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's plea of guilty was voluntarily entered.

STATEMENT

Indictment Cr. 544-69, filed on December 15, 1969, in the United States District Court for the District of New Jersey, charged petitioner and fifty-two others with conspiracy to violate 18 U.S.C. 1952 by jointly promoting and managing a gambling enterprise prohibited by state laws, and traveling in interstate commerce and using the telephone in pursuit of the scheme, in violation of 18 U.S.C. 371. At that time petitioner was already under indictment in a separate federal criminal case for conspiracy and extortion (Cr. No. 111-68, dated March 21, 1968).

On September 15, 1970, trial commenced in Newark on the extortion case (Indictment Cr. 111-68) and ended in conviction of petitioner and his coconspirators. On October 2, 1970, petitioner was sentenced to five years' imprisonment on each of the three counts of Indictment Cr. 111-68, the sentences to run consecutively. These convictions were appealed to the Court of Appeals for the Third Circuit (Nos. 19,310, 19,311, 19,312) and were argued on December 10, 1970.

On January 2, 1970, petitioner pleaded not guilty to the gambling conspiracy indictment (Cr. 544-69) and on December 15, 1970, the district court set February 2, 1971, as the preemptory trial date.

On January 13, 1971, Special Attorney Herbert T. Posner of the Justice Department's Organized Crime and Racketeering Section and the prosecutor in charge

of the gambling conspiracy case by chance met Samuel Bozza, the New Jersey attorney who had represented petitioner in the extortion case, in the hallway of the federal courthouse in Newark (A. 106a; A. 108a).[1] Bozza asked about the status of Indictment Cr. 544-69 and Posner informed the attorney that he had been instructed to file a notification seeking to treat petitioner as a dangerous special offender in the event Indictment Cr. 544-69 resulted in a conviction (A. 109a).[2] Bozza replied that imposing a twenty-five year sentence "would be like killing him." Posner said, however, that if petitioner pleaded guilty the government would recommend imposition of a concurrent sentence, and would not oppose a suspended sentence if the court were inclined to order it. Bozza advised that he would try to convince petitioner to enter the guilty plea (A. 109a).

On January 14, Bozza notified Posner by telephone that petitioner had agreed to plead guilty. Posner called Raymond Brown, petitioner's attorney in the gambling conspiracy case, regarding these events. Brown asked to meet with petitioner and Posner (A. 110a).

---

[1] Petitioner was represented in the two cases by different counsel; in Indictment Cr. 111-68 by Samuel Bozza, a member of the bar for forty-two years (A. 76a); in Indictment Cr. 544-69 by Raymond A. Brown, an attorney with extensive criminal law experience (A. 155a). "A." refers to the "Appendix on Behalf of Defendant-Appellant," filed with the Clerk of this Court.

[2] Mr. Posner had already informed petitioner's attorney of record in that case, Raymond Brown, and his law partner, Irving Vogelman, of this development in September or October of 1970 (A. 109a).

The next day Posner, Brown, the petitioner and two Internal Revenue Service agents met for about fifteen minutes at the courthouse in Newark. According to Posner's later testimony (A. 111a-112a), the accuracy of which petitioner does not contest:

> * * * I informed Mr. DeCavalcante and reminded Mr. Brown because I told Mr. Brown and Mr. Vogelman several times I had been instructed to file the notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event he was convicted of this charge, and that he might be liable to a sentence of twenty-five years upon conviction. I told Mr. DeCavalcante and Mr. Brown that in the event Mr. DeCavalcante pled guilty, I would be precluded from filing this notification because the language of the statute itself said this notification shall not be filed unless there is a reasonable time before trial. At that point, Mr. DeCavalcante said, I want a suspended sentence and I said, the Government would recommend a concurrent sentence and we would not oppose the imposition of a suspended sentence if the Court was so inclined, but I reiterated to Mr. DeCavalcante and Mr. Brown that in no way would this be taken as a guarantee as to what the sentence would be.

When petitioner then expressed concern about the adverse publicity he had been receiving, Posner indicated that he would not oppose holding the proceedings *in camera*, and would not issue a press release. Brown told petitioner that these matters did not constitute appropriate reasons for pleading guilty and that he would not represent petitioner on a guilty plea unless petitioner was in fact guilty of the charge.

Brown told petitioner that the appeal in the extortion case could be decided either way, and petitioner was running the risk that a sentence would have to be served even if the appeal was successful and the other conviction reversed (A. 112a-A. 113a). Brown instructed petitioner that the court would ask questions about the plea, which had to be answered truthfully (A. 113a). Brown then asked Posner and the agents to allow him to speak privately with petitioner. The prosecutor and the agents left the meeting room. About fifteen minutes later Brown summoned Posner, and stated that petitioner had decided to plead guilty (A. 113a).

That same day, January 15, 1971, before the Honorable Leonard I. Garth, the petitioner, with Mr. Brown as counsel, retracted the original plea of not guilty and entered a guilty plea to Indictment Cr. 544-69.

Pursuant to the petitioner's request, the hearing was held *in camera* (A. 58a). Judge Garth inquired as to the petitioner's background, his health, his physical well-being, whether the defendant was acquainted with Indictment Cr. 544-69, whether he had reviewed the indictment with counsel (A. 36a-A. 38a). The court then recited the portion of the indictment applicable to petitioner, stating that it charged that from January 1, 1965, to the date of return, petitioner and others had willfully and knowingly conspired to commit offenses in violation of 18 U.S.C. 1952; that in executing the conspiracy, telephone calls had been made between New Jersey and Troy, New York, and elsewhere to promote and man-

age a gambling enterprise violative of specified New Jersey penal statutes; that petitioner and others had traveled between New Jersey and New York and elsewhere with intent to promote the unlawful enterprise; that petitioner and one Alessio Barrasso had supervised and controlled the business of accepting wagers while other co-defendants served in other capacities necessary to the success of the enterprise; and that, as an overt act, petitioner and Alessio Barrasso had met together on December 15, 1968, at 21 Michigan Avenue, Kenilworth, New Jersey (A. 38a-A. 41a). The court then continued (A. 41a-42a):

> THE COURT: Now, I've read that Indictment in its pertinent part to you, Mr. DeCavalcante, to determine if that is the Indictment to which you now desire to retract your not guilty plea and to which you now desire to plead guilty.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And the matters which are charged, the facts and matters charged therein, the matters which were either performed by you or caused to be performed by you within the terms of that indictment, sir?
>
> MR. BROWN (Defense Counsel): Did you do these things that the indictment says, supervise them?
>
> THE DEFENDANT: I plead guilty.
>
> THE COURT: You plead guilty?
>
> THE DEFENDANT: That's right.

Judge Garth then discussed the maximum punishment and determined that petitioner was aware that his plea constituted a waiver of trial and of the right to produce witnesses in his own behalf (A. 42a). The

Court then asked the following questions (A. 42a-43a):

> THE COURT: Is this plea that you are now making a voluntary plea and one of your own volition?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have there been any threats or promises made to you to induce you to plead guilty?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has there been any understanding or prediction made to you concerning the sentence that you will receive?
>
> THE DEFENDANT: No, sir.

Petitioner's attorney then stated (A. 43a):

> MR. BROWN: If your Honor pleases, in Mr. Posner's presence I informed Mr. DeCavalcante for the last time, no less than forty minutes ago, that you would ask and he must answer truthfully as to whether or not he was guilty of the charges, and not plead for any accommodation or any hope or speculation or anything else, and I told him that if he were not guilty that I would not represent him on the plea and that he should not therefore plead guilty, and I'm repeating that for his benefit now. He informed me that he was pleading guilty to the charge. That's all he said.

The Court, after this colloquy, granted the petitioner's motion and accepted the retraction and entered a plea of guilty to Indictment Cr. 544-69 (A. 44a).

On March 10, 1971, the court of appeals decided the extortion case (Indictment Cr. 111-68), reversing

in part and in part remanding for a new trial. On March 12, 1971, petitioner filed a motion for leave to withdraw his guilty plea in Indictment Cr. 544-69. On March 15, 1971, after a hearing, Judge Garth denied the motion (155a-159a). Thereafter, Judge Garth filed Findings of Fact and Conclusions of Law upon which the denial was predicated. These Findings of Fact were as follows (Pet. App. 35-37):

> 1. Defendant was at all times herein represented by experienced and able counsel.
>
> 2. Defendant's counsel told defendant in open court that he would not represent the defendant if said plea of guilty were being made for any reason other than that the defendant was in fact guilty as charged (R. 41)[3] [A. 112a].
>
> 3. When the defendant pleaded guilty he knew he had an appeal pending (R. 25) [A. 96a].
>
> 4. Defendant knew that if his conviction were reversed his sentence imposed pursuant thereto would fall (R. 26) [A. 97a].
>
> 5. Defendant told the truth when he stated to the Court at the time of entering his plea of guilty that said plea was not induced by any promises or threats (R. 28) [A. 99a].
>
> 6. Defendant told the truth when he stated to the Court at the time of entering his guilty plea that there had been no understanding or prediction made to him concerning his sentence (R. 28) [A. 99a].
>
> 7. Defendant told the truth when he stated to the Court at the time of entering his guilty plea

[3] "R." indicates the page of the transcript of proceedings of March 15, 1971, cited by the trial court; the bracketed citation which follows shows the page of the Appendix which reproduces the cited page of the transcript.

that he made said plea voluntarily and of his own volition (R. 30-31) [A. 101a-102a].

8. Defendant knew that only the Court could determine his sentence (R. 40-41, 43-44) [A. 111a-A. 112a, A. 114a-A. 115a].

9. Mr. Posner informed Mr. Bozza on January 13, 1971, that the Government intended to file a notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event he was convicted upon trial in Criminal Number 544-69, and that should Mr. DeCavalcante plead guilty the Government would recommend a concurrent sentence and not oppose the imposition of a suspended sentence if the Court were inclined to grant one (R. 37-38) [A. 108a-A. 109a].

10. At the meeting arranged pursuant to Mr. Brown's request on January 15, 1971, Mr. Posner told the defendant, in the presence of his attorney, that the Government intended to file a notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event of a conviction. Both the defendant and his counsel were informed that a guilty plea would preclude the filing of said notification (R. 39-40) [A. 110a-A. 111a].

11. The defendant was told several times that the Government could not guarantee him what sentence would be imposed by the Court, but would not oppose the imposition of a suspended sentence, should the Court be inclined to grant one (R. 40-41) [A. 111a-A. 112a].

12. The defendant was concerned about further adverse publicity, and the Government represented that it would not issue any press release regarding a plea of guilty (R. 41) [A. 112a].

13. The defendant was given an opportunity to speak with his attorney in private, and did so for fifteen minutes, after which time he advised Mr. Posner that he would plead guilty (R. 42-43) [A. 113a-114a].

14. The Government's witnesses have been dismissed and the Government has no knowledge of the whereabouts of one of its key witnesses (Government affidavit) [A. 57a].[4]

Petitioner was sentenced on March 15, 1971, to a term of five years in prison and a $10,000 fine (A. 173a-A. 176a).

ARGUMENT

Petitioner contends that the prosecutor's statement that he was instructed to file an information designating petitioner a "dangerous special offender" (18 U.S.C. 3575), if the case went to trial, rendered the guilty plea involuntary. The information regarding the instruction to invoke the dangerous offender statute at trial was factually correct. The prosecutor did not suggest that the statute was unusable if petitioner pleaded guilty, but that an immediate plea would preclude its use in view of the statutory requirement of reasonable notice before a plea or a trial. Petitioner undoubtedly weighed the fact that that statute could not be applied if he pleaded guilty immediately; that consideration, however, did not constitute unlawful inducement. As stated in *Brady* v. *United States*, 397 U.S. 742, 754:

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[4] The missing witness has since been located.

> * * * prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage.

Significantly petitioner makes no argument that he was not a proper subject for treatment as a dangerous special offender. Petitioner's quotation from *Brady* [5] (Pet. 19) concerning the impropriety of "the prosecutor * * * deliberately employ[ing] [his] charging * * * powers to induce * * *" a plea is too selective. The Court continues:

> In Brady's case there is no claim that the prosecutor threatened prosecution *on a charge not justified by the evidence* * * * [emphasis added].

So here there is no claim that the government lacked either evidence or cause to treat petitioner as a dangerous special offender.

Petitioner analogizes the filing of a special offender information to the filing of a new charge and attempts to draw a constitutional distinction between a plea bargain to dismiss or reduce pending charges (which he deems permissible) and an agreement not to file additional charges (which he considers impermissible). Particularly in a case such as this, where there is no suggestion that the additional charge is

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[5] *Brady* v. *United States*, 397 U.S. 742 at 751, n. 8.

"not justified by the evidence," there is no basis for such a distinction. Pressures emanating from the obligation to provide a speedy trial require that indictments be sought as soon as the evidence is sufficient. It is not at all unusual, after indictment and during trial preparation, to have evidence accumulate justifying additional charges or a superseding indictment. If a trial is to be had, judicial economy requires—except in cases of prejudicial joinder—that related charges be tried together. If a defendant faced with the prospect of a superseding indictment elects to plead to the pending one, he is no more coerced than a defendant who bargains for a reduced charge.

Petitioner also argues that, despite his representations when he entered the plea, there was an agreement reached prior to acceptance of the plea which the government was under a duty to disclose. However, as the district court found, the only promise made by the prosecutor was that he would recommend concurrent sentences and would not oppose suspension if the Court were inclined to grant it, but the prosecutor also made it clear that the government could not guarantee what sentence would be imposed. Since petitioner sought to withdraw his plea prior to sentence, and since the other sentence had by then been vacated, the government never had the opportunity to make good on its promise.[6] Thus the district

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[6] *Santobello* v. *New York*, certiorari granted, 402 U.S. 994, is inapposite. That case involves the unknowing breach by one Assistant District Attorney of another's agreement with the defendant that, in exchange for a plea of guilty, the state would make no recommendations at the sentence hear-

court properly found that petitioner "told the truth when he stated to the Court at the time of entering his plea of guilty that said plea was not induced by any promises or threats."

Finally, petitioner argues that Judge Garth violated the portion of Rule 11 prohibiting the entry of a judgment on the plea unless the court was "satisfied that there is a factual basis for the plea." The judge was not required to make that determination upon accepting the plea but only before entering judgment on the plea.[7] The record contains several indications that the court was aware of the facts before entry of judgment. There was evidence of the existence of an extensive and updated probation report. In imposing sentence, the court noted that it was tailoring the punishment to the degree of culpability of each of the defendants charged in the conspiracy indictment. Moreover, by the time of sentence, more than thirty of the co-defendants had pleaded guilty before Judge Garth, many had been sentenced by him, and charges against four others had been dismissed—

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ing. As Judge Garth noted, the government's only assurance in this case related to the recommendation of a concurrent sentence (A. 130a). Because the hearing on petitioner's motion to withdraw his plea occurred before sentencing, the government could not possibly have violated any terms of an agreement, knowingly or unknowingly.

[7] The court is not required to obtain its knowledge of a factual basis from the defendant. The Advisory Committee suggests three alternative sources: (1) the defendant; (2) the prosecutor; and (3) the presentence report. Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules; see also *McCarthy* v. *United States*, 394 U.S. 459, 463, n. 6.

some the very day of petitioner's hearing. To suggest that Judge Garth was unaware of the underlying facts would be unrealistic in light of the court's long experience with this case via numerous co-defendants. Neither Rule 11 nor the cases cited by petitioner require that the court set forth a detailed factual basis in the record. Certainly the Rule is satisfied in a case where the record shows that the court was aware of the facts before entering judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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